

SERVICE DATE - MARCH 16, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-468 (Sub-No. 5X)

PADUCAH & LOUISVILLE RAILWAY, INC. – ABANDONMENT EXEMPTION –
IN McCRACKEN COUNTY, KY

Decided: March 15, 2004

By decision served on June 20, 2003, (June 2003 decision) the Paducah & Louisville Railway, Inc. (P&L), was granted an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon approximately 5,780 feet of rail line extending from station number 17+55, near Caldwell Street, to station number 64+00, near 6th Street, on each side of railroad milepost 1, in the city of Paducah, McCracken County, KY (the line). The exemption was granted subject to trail use, public use, historic preservation, environmental, and standard employee protective conditions. Boral Bricks, Inc. (Boral), the sole shipper on the line, filed a petition to reopen on July 15, 2003, and P&L replied. Boral also sought to stay the effectiveness of the decision, but its stay request was denied by a decision served on July 18, 2003, and the exemption became effective on July 20, 2003. Boral's petition to reopen will be denied.

DISCUSSION AND CONCLUSIONS

A petition to reopen an abandonment proceeding must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances that would materially affect the Board's prior decision. 49 CFR 1152.25(e)(2)(ii), (e)(4). Boral's petition does not provide any new evidence or demonstrate changed circumstances. Rather, Boral seeks to reopen this proceeding on the grounds that the Board's decision contains material error. As discussed below, Boral has failed to show that reopening this proceeding is warranted.

Boral contends that the Board failed adequately to address crucial points that Boral had raised in its reply in protest to P&L's petition for exemption (reply in protest). Specifically, petitioner asserts that: (1) the Board ignored record evidence concerning likely market abuse and the harm to Boral's business that would result from abandonment of the line; (2) there is no record evidence to support the Board's determination that transportation alternatives are available to Boral; (3) the Board failed to consider the abandonment's harmful effect on the Paducah community; (4) the abandonment exemption violates the federal energy conservation policy; and (5) there is inadequate evidence to support the grant of the exemption. In reply, P&L argues that there was no material error in the June 2003 decision and that Boral's petition to reopen should be denied.

Abandonment determinations involve an assessment of whether public convenience and necessity permit a carrier to leave a market it has served in the past. See 49 U.S.C. 10903(d). By their nature, these determinations involve a balancing of the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and interstate commerce. See Camas Prairie Railnet, Inc. – Abandonment – in Lewis, Nez Perce, and Idaho Counties, ID, STB Docket No. AB-564 (STB served Sept. 13, 2000) (Camas), citing Colorado v. United States, 271 U.S. 153 (1926). Boral argues that the June 2003 decision did not pay enough attention to the adverse effects that abandonment would have on its interests. But in fact, the decision recognized that abandonment would adversely affect Boral; it simply found the disadvantage to Boral to be outweighed by the hardship to P&L of having to continue providing service over the line.

As noted in the June 2003 decision, the combined traffic-generated revenues for the line in 2001 and 2002 were approximately \$80,000, whereas repair of the line and seven grade crossings would amount to at least \$616,066. See Verified Statement of Gaylon I. James, Attachment B of P&L's Petition for Exemption at 14. (P&L states that this estimate includes only the cost to replace rail ties and does not include the cost of replacing track, which could be necessary on portions of the line. See P&L's Reply at 9.) Boral did not provide any evidence, beyond its assertions, to support its contentions that continued service on the line would be economically justified. Given the record, the Board was satisfied that the certain burden of the large expenditures required for P&L to rehabilitate the line and seven grade crossings, in combination with the low traffic levels, outweighed the harm that Boral claims it would incur if service is not restored on this line. Moreover, as P&L points out, "a shipper may not insist upon the maintenance of a burdensome line solely for its benefit." See P&L's Reply at 7-8, citing Busboom Grain Company, Inc. v. ICC, 856 F.2d 790, 795 (7th Cir. 1988) (Busboom) (citation omitted). The evidence was sufficient here for the Board to make an informed decision on the merits of the proposed abandonment exemption.

Boral relies on various agency and court decisions that found insufficient evidence to support granting an abandonment exemption; however, the results of the balancing test in abandonment proceedings are fact-specific and those cases are factually distinguishable. For example, in Busboom, which Boral cites, the court simply expressed its concern that the Interstate Commerce Commission (ICC), the Board's predecessor, had not adequately explained in its decision how the \$75,000 annual costs to the two shippers were outweighed by the carrier's annual losses of \$50,000. In Georgia Public Service Commission v. United States, 704 F.2d 538, 545 (11th Cir. 1983), the court found the ICC's balancing inadequate because, among other reasons, its finding of the existence of alternative means of transportation was without support. And, in Boston and Maine Corporation – Abandonment Exemption – In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 75X) (STB served Dec. 31, 1996), the Board, after performing appropriate balancing, denied abandonment after finding that the carrier did not establish that continued operation would be a burden, the shipper

provided evidence of present growth in its business, and there was an actual physical barrier to the use of trucks as alternative transportation.

Those cases, in which the balancing weighed against abandonment, are different from this case, which is more comparable to Union Pacific Railroad Company – Abandonment Exemption – in Lancaster County, NE, STB Docket No. AB-33 (Sub-No. 112X) (STB served Sept. 24, 1997). There, despite the shipper's claims that abandonment would cause it extensive economic harm, that truck transportation would increase its costs substantially, and that it would be unable to compete with business competitors that had access to rail, the Board weighed the relevant factors and, finding that operation of the line would be uneconomic, granted the exemption. In that case, rail accounted for 35-40% of the shipper's sales.

In this case, Boral claims that it lacks adequate transportation alternatives and that the abandonment would result in an abuse of market power. But, by its own admission, Boral currently uses truck transportation for 50% of its inbound shipments. Furthermore, the record evidence shows that shipping by truck is the standard practice in the brick industry today. See P&L's Reply at 11, citing Brick Industry Association, The American Brick Industry (August 18, 2003), at <http://www.gobrick.com/html/biaoverview.html>. Moreover, Boral has a transloading alternative. Boral can store and transload its bricks at three sites, one located a mile and a half from Boral's plant, and the other two located about a mile from the plant. The June 2003 decision correctly found that there are viable transportation alternatives.

In the June 2003 decision, the Board expressly acknowledged Boral's claim that it would incur additional transportation costs if it had to use trucks for all of its shipping needs and its claim that this would place it at a competitive disadvantage. However, the fact that a shipper is likely to suffer harm and added expense is insufficient by itself to outweigh the detriment to the public interest caused by continued operation of uneconomic and excess facilities, especially where alternative transportation is available. See Camas citing Chicago and North Western Transp. Co. – Abandonment, 354 I.C.C. 1, 7 (1977). Nor does the fact that transportation alternatives are more expensive provide any basis for finding that a railroad is abusing its market power simply by attempting to exit a market.

Boral stated that abandonment would increase the number of trucks serving its Distribution Center and claimed that this would "cause a severe detrimental impact on air quality." Boral contends that the abandonment exemption violates the federal energy conservation policy, which is to "encourage and promote energy conservation," See 49 U.S.C. 10101(14). However, as noted in the June 2003 decision, the environmental analysis shows that the abandonment would not have significant environmental impacts. The Board's Section of Environmental Analysis, in an Environmental Analysis served May 2, 2003, at 3, calculated that the abandonment would generate approximately two additional trucks per day on area roads during a 240-workday year, using a rail-to-truck conversion of

four trucks per carload. This increase would not exceed the Board's threshold for study, which is an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment [49 CFR 1105.7(e)(5)(C); see also June 2003 decision at 3, n.4]. Thus, Boral's assertion that P&L was required to submit more detailed environmental data in its environmental report is incorrect, and the allegation that the Board failed to examine relevant data and apply relevant law is without merit.

Boral also contends that the Board failed to address the adverse impact that the abandonment would have on the Paducah community. Boral generally claimed that abandonment of the line would result in increased traffic congestion, lead to an increased need for road repairs that would raise taxes for Paducah residents, and negatively affect road safety conditions. However, Boral has failed to provide any relevant evidence to demonstrate that an additional two trucks per work day would have such an adverse or even noticeable impact on the community. That the Board did not address such unsupported assertions was not material error.

Finally, Boral claims that the record evidence is inadequate to support the grant of an exemption. As in any abandonment case, whether authority is sought by application or petition, the railroad must demonstrate that the line in question is a burden on interstate commerce. To make its showing, P&L submitted evidence to show that the costs that the railroad would incur for rehabilitation of the line far exceed the revenues attributable to it. Boral has not supported its argument that P&L's evidence regarding the cost of rehabilitating the line is incorrect, nor has Boral challenged P&L's revenue figures. As discussed above, P&L met the burden of showing that the current situation imposes a burden that outweighs the harm that would befall Boral, the only shipper on the line, as a result of loss of rail service. Boral has not shown that the Board erred in its evaluation.

In sum, Boral has not demonstrated any material error in the June 2003 decision. Accordingly, the petition to reopen will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to reopen is denied.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary